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No. 05-1157

In The
Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC,
fka CREDIT SUISSE FIRST BOSTON LLC, ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The American Antitrust Institute ("AAI") is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The Advisory Board of AAI, which serves in a consultative capacity,[2] consists of prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.

AAI's Board of Directors has authorized the filing of this brief because it believes that the Second Circuit Court of Appeals correctly determined that the petitioners' allegedly anticompetitive activities are not protected from the broad reach of the antitrust laws by the doctrine of implied immunity. Should this Court determine otherwise, the doctrine of implied immunity will be unnecessarily expanded thereby undermining the intended effects of the antitrust laws. Thus, in an effort to protect competition as a fundamental policy of this nation, the AAI submits this brief in support of the respondents.

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no person or entity other than AAI or its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] The AAI is managed by its Board of Directors. The individual views of members of the Advisory Board may differ from the positions taken by AAI.

SUMMARY OF ARGUMENT

Any determination of implied immunity requires recognition of the primacy of Congress's policy favoring competition which underlies this nation's antitrust laws. The arguments of petitioners and several amici focus primarily on the policies underlying the securities laws in question. Such focus is misplaced and understates the role of the antitrust laws as a fundamental national policy. The existence of regulation does not necessarily imply a disregard for competition. Indeed, Congress and this Court have seen no reason to displace the role of the antitrust laws due to the mere existence of a regulatory agenda. It is unnecessary to confer broad immunity in order to have properly functioning regulation.

Against this backdrop, the Second Circuit Court of Appeals was correct in holding that the claims arising from the tying and laddering conduct were not immunized from the broad reach of the antitrust laws. The court of appeals, relying on this Court's precedent, properly determined that the regulatory scheme of the Securities and Exchange Commission was not so pervasive as to indicate a Congressional intent to abandon competition, nor did the court of appeals find the type of conflict (or potential conflict) between a regulatory action and the antitrust laws such that application of the antitrust laws would frustrate the regulation, thereby supporting an inference that Congress must have intended to displace the antitrust laws in these regards.

Extending any implied immunity to conduct supposedly "inextricably linked" to authorized conduct would create a wholly new category of implied immunity, inconsistent with the decisions of this Court and the appropriate

recognition of the primacy of the policies favoring competition that underlie the antitrust laws. Nor does this Court's holding in *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP. (Trinko)*, 540 U.S. 398 (2004) require the application of immunity to the present facts. *Trinko* does not address implied immunities and its reasoning is inconsistent with settled implied immunities analysis.

There is no justification for a heightened pleading standard, and there is certainly no justification for a heightened standard to plead around an affirmative defense, which is what petitioners and amici argue in favor of here. Their request conflicts with the undeviating line of cases culminating in this Court's decision in *Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 919-20 (2007).

This Court should reject a categorical rule prohibiting the introduction of evidence of authorized conduct from which the jury could infer unauthorized behavior, not immunized under the antitrust laws. There is no reason in this case to depart from longstanding and well-established precedent to create a categorical rule for implied immunity cases. Any categorical prohibition would be contrary to this Court's longstanding jurisprudence that conduct that might otherwise be subject to immunity can still constitute part of the evidence admitted, within the discretion of the trial court, on a motion or at trial. *See United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

ARGUMENT

I. ANY DETERMINATION OF IMPLIED IMMUNITY MUST BE MADE AGAINST THE SETTLED RECOGNITION OF THE PRIMACY OF COMPETITION REFLECTED BY THE SHERMAN ACT AND JUDICIAL RELUCTANCE TO FOSTER PROTECTIONISM THROUGH PROLIFERATION OF IMPLIED IMMUNITIES.

Petitioners and several amici would have this Court determine the existence and scope of any implied immunity in this case by focusing primarily on the policies underlying the securities laws in question and the resulting regulation of securities markets. Pet. Br. at 23-38; *See also* NYSE Br. at 13-17. But that focus turns the settled jurisprudence on its head and diminishes the importance of the policies favoring competition that underlie the Sherman Act. The antitrust laws constitute a "fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966). "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). It is for this reason that courts have long recognized that it is improper for courts to "set sail on a sea of doubt" and to arrogate to themselves the power to declare "how much restraint of competition is in the public interest, and how much is not" through judicially-crafted limitations on the application of the antitrust statutes. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898),

modified & aff'd, 175 U.S. 211 (1899).[3] This cautious view of immunity claims is consistent with the proper role of the courts in enforcing the nation's fundamental belief in the benefits of competition. *See* 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 243, at 40 (2d ed. 2000) (stating that the court's proper role in determining the existence and scope of any implied immunity is to take "a skeptical, activist view that sees the antitrust court as a watchful overseer not only of private conduct, but also of the agencies themselves").

Moreover, the primary focus on regulation as the starting point of analysis, as urged by petitioners and certain amici, rests on a false dichotomy between antitrust/competition, on the one hand, and regulation/monopoly on the other. As this country's economy moves increasingly to the "deregulated," there is a reduced level of tension between regulation and competition. *See* Peter C. Carstensen, *Evaluating "Deregulation" of Commercial Air Travel: False Dichotomization, Untenable Theories, and Unimplemented Premises*, 46 WASH. & LEE L. REV. 109, 116 (1989) (noting dichotomy of regulation/

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[3] Although the antitrust laws are expressed as a statute and not a Constitutional provision, Congress "exercise[d] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980) (quoting *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932)). Accordingly, claims of implied immunity are viewed with a healthy dose of skepticism by the courts. *United States v. National Ass'n of Securities Dealers, Inc. (NASD)*, 422 U.S. 694, 719 (1975) (holding that implied antitrust immunity "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system"); *see also United States v. AT&T Co.*, 461 F. Supp. 1314, 1321 (D.D.C. 1978) (holding that regulated conduct is immune by implication from antitrust laws only in narrow instances).

deregulation "is false with respect to analysis of regulation and deregulation of any industry, and is extremely so with respect to commercial air travel"). Even in deregulated industries, antitrust and regulation serve complementary but not identical purposes. *See* Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation Is to Blame for California's Power Woes (or Why Antitrust Law Fails to Protect against Market Power When the Market Rates Encourage Its Use)*, 83 OR. L. REV. 207 (2004). What this means is that the existence of regulation does not necessarily imply a disregard for competition.

Confining the scope of immunity to limited and narrow circumstances protects the policy choice Congress has made in establishing and repeatedly reaffirming its commitment to the antitrust laws as a critically important component of the national economy. Congress and this Court have seen no reason to displace the role of the antitrust laws due to the mere existence of a regulatory agenda. *See National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 389 (1981) (The existence of a regulatory scheme by itself does not evidence an intent to repeal the antitrust laws "with respect to every action taken within the industry."). As this Court has recognized, it is unnecessary to confer broad immunity in order to have properly functioning regulation.

II. THE SECOND CIRCUIT CORRECTLY APPLIED THIS COURT'S JURISPRUDENCE ON IMPLIED IMMUNITIES IN HOLDING THAT THE TYING OR LADDERING CLAIMS WERE NOT IMPLIEDLY IMMUNIZED, AND THIS COURT SHOULD REJECT THE INVITATION TO EXTEND ANY IMPLIED IMMUNITY TO CONDUCT "INEXTRICABLY LINKED" TO OTHER IMPLIEDLY IMMUNIZED CONDUCT.

The Second Circuit below correctly decided that although some of the conduct (such as the collaborative underwriting of the IPOs or stabilization activities) identified in respondents' complaints was immunized from antitrust liability because of the regulation of the securities markets in question, the alleged tying and laddering conduct was not immunized. As the Brief for the United States as Amicus Curiae shows, this holding represents "a proper accommodation" of the policies underlying both sets of laws. United States Amicus Br. at 10-11. We agree with the Solicitor General that extending an implied immunity to the tying or laddering claims would unduly disregard the policies of competition underlying the antitrust laws where such disregard is not required by the regulation of the securities markets.

The touchstone of any judicial finding of implied immunity must be a determination that Congress must have intended such an immunity. *National Gerimedical Hosp. and Gerontology Ctr.*, 452 U.S. at 389. The settled holdings of this Court, repeatedly applied by lower courts throughout the country, find such an implied intent to immunize only in two narrowly defined situations: (1) a regulatory scheme so pervasive as "to indicate that Congress must be assumed to have forsworn the paradigm of competition," *Billing v. Credit Suisse First Boston, Ltd.*,

426 F.3d 130, 161 (2d Cir. 2005) (citing *NASD*, 422 U.S. at 730), or (2) where there is a specific conflict (or potential conflict) between a regulatory action and the antitrust laws so that application of the antitrust laws would frustrate the regulation, thereby supporting an inference that Congress must have intended to displace the antitrust laws in these regards.[4] *Gordon v. New York Stock Exchange*, 422 U.S. 659, 691 (1975) (the regulatory scheme must render the antitrust laws nugatory for immunity to apply). Consistent with repeated holdings from this Court, the Second Circuit below found that regulation of the IPO securities market was not sufficiently pervasive to warrant an implied immunity. *Billing*, 426 F.3d at 170-171. With regard to the second circumstance warranting implied immunity, the court below faithfully applied this Court's reasoning in *Gordon*. Noting that both tying and laddering are disapproved by the regulators, the Second Circuit correctly determined that there is nothing in the imposition of antitrust liability for this conduct that creates a conflicting mandate on the defendants or frustrates regulation of the IPO market. *Id.* at 169.

While the Solicitor General agrees that any implied immunity (for the collaborative underwriting of the IPOs,

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[4] For example, the regulation could be undermined by (i) subjecting the regulated persons or firms to conflicting requirements – one requirement under the regulation and a conflicting requirement under the antitrust laws; or (ii) making it impossible for the clear regulatory intent to be accomplished. *Gordon*, 422 U.S. at 689 (finding immunity where the exchanges "might find themselves unable to proceed without violation of the mandate of the courts or the SEC"); *see also*, *NASD*, 422 U.S. at 727 (finding immunity, in part, because precluding fixed commission rates "would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates").

for example) does not extend to the tying and laddering conduct, the Solicitor General seeks to extend the implied immunity for the "authorized" conduct to that conduct which is "inextricably linked" to immunized collaborative underwriting conduct. United States Amicus Br. at 11-16. We disagree. Extending any implied immunity to conduct supposedly "inextricably linked" to authorized conduct creates a wholly new category of implied immunity, inconsistent with the decisions of this Court and the appropriate recognition of the primacy of the policies favoring competition that underlie the antitrust laws.

The Solicitor General's attempt to create a third category of implied immunity should be rejected for three reasons. *First*, this new category goes beyond the proper limitation for any implied immunity that this Court has recognized. Thus, in *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963), this Court stated the proper limitation: "Repeal is to be regarded as implied only *if necessary* to make the [subsequent law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." (Emphasis added). Thus, the question with respect to the scope of immunity is not whether the conduct is "intertwined" with permitted conduct but rather whether such immunity is "necessary" to make the regulatory regime work.

Second, the Solicitor General's proposed standard would reverse the presumption from one *against* a finding of implied immunity to one in favor of such a finding. In defining the new category, the Solicitor General describes the inquiry of the trial court: "[I]f at any point the district court determines that respondents cannot establish an antitrust violation without relying on conduct

that is authorized by the regulatory scheme or cannot be practicably separated from authorized conduct, the court must grant judgment for petitioners." United States Amicus Br. at 29. Thus, under the Solicitor General's suggestion, the courts would create immunity without any finding that such immunity was necessary or that Congress impliedly intended such immunity.[5]

Third, the Solicitor General's analysis relies heavily on the Noerr-Pennington line of cases to support the proposition of extending implied immunity to "inextricably linked" conduct. But the Noerr-Pennington cases and their analyses reflect heightened First Amendment concerns not present here. This Court has recognized that Congress has "traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation." *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961) (noting that expansive application of antitrust laws in the political realm would run against such judicial and Congressional caution). Those heightened First Amendment concerns make inapplicable the primacy of the competition policy which is at the heart of the implied immunity analysis. But, outside of the First Amendment context, the primacy of the competition policy prevails, warranting the traditional reluctance against expansion of implied immunity. The Solicitor General's reliance on the Noerr-Pennington doctrine is misplaced.

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[5] Thus, the Solicitor General would seek to expand immunity to activity not immune, creating immunity by proximity.

III. *TRINKO* DOES NOT REQUIRE EXPANDING IMPLIED IMMUNITY TO THE TYING AND LADDERING CLAIMS.

Petitioners offer dicta in *Trinko* to justify extending implied immunity to the tying and laddering here. Petitioners claim that "this Court endorsed a cost-benefit calculus" that provides guidance for the claimed immunity from the antitrust laws presented here. Pet. Br. at 26. However, the issue of implied immunity was not presented in *Trinko* because of an "antitrust-specific saving clause". *Trinko*, 540 U.S. at 406. Rather, the question before the Court was "whether the allegations of [Trinko's] complaint fit within existing exceptions [to the general rule that competitors have no duty to cooperate with rivals] or provide a basis, under traditional antitrust principles, for recognizing a new one." *Id.* at 408. This Court held that the allegations did not fit within any of the existing exceptions to the general rule and declined to create a new exception.

To be sure, in reaching its conclusion the Court weighed what it termed a "realistic assessment" of the antitrust laws with the benefits of antitrust intervention. *Id.* at 414. However, this type of analysis "is unrelated to existing Section 2 jurisprudence and highlights just how narrow the scope is for the future application and the decision rule in Trinko." Jonathan L. Rubin, *The Truth About Trinko*, 50 ANTITRUST BULLETIN 725 (2005). The suggested analytical approach in *Trinko*, is not a traditional implied immunity analysis. It neither recognizes the primacy of the policy favoring competition at the heart of

this Court's implied immunities jurisprudence nor reconciles the policies of the antitrust laws with those of the regulatory scheme. *Silver*, 373 U.S. at 357.

IV. THIS COURT SHOULD NOT IMPOSE A HEIGHTENED PLEADING STANDARD.

Absent Congressional action to amend Federal Rule of Civil Procedure 8, this Court consistently has rejected attempts – like those proposed by petitioners and several amici here – to impose a heightened pleading standard for specific types of cases because of the specific nature of the claim or defense. *See, e.g., Jones*, 127 S.Ct. at 919-20 (stating that "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts," *quoting Hill v. McDonough*, 547 U.S. ___, 126 S.Ct. 2096 (2006) (slip op., at 8) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002))).[6]

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[6] In a consistent line of decisions spanning many years, this Court has repeatedly rejected attempts to modify Rule 8 by judicial decision across a variety of claims and affirmative defenses. *See Jones*, 127 S.Ct. at 921-22 (concluding that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints); *Hill*, 547 U.S. ___ (slip op. at 8) (rejecting a proposal that 42 U.S.C. § 1983 suits challenging a method of execution must identify an acceptable alternative); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (reversing court of appeals for requiring employment discrimination plaintiffs to specifically allege the elements of a prima facie case of discrimination and explaining that "'the Federal Rules do not contain a heightened pleading standard for employment discrimination suits,'" and a "'requirement of greater specificity for particular claims'" must be obtained by amending the Federal Rules); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (unanimously reversing court of appeals for imposing a heightened

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There is no justification for a heightened pleading standard for antitrust claims; and there is certainly no justification for a heightened standard to plead around an affirmative defense, which is what petitioners and amici want here. Both *Jones* and *Leatherman* are instructive. In both cases, the arguments for heightened pleading standards involved pleading the absence of affirmative defenses. *See Jones*, 127 S.Ct. at 921 (concluding that "failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints"); *Leatherman*, 507 U.S. at 167 (rejecting the Fifth Circuit's conclusion that "'[i]n cases against governmental officials involving the likely defense of immunity we require of trial judges that they demand that the plaintiff's complaints state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity,'" *quoting Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985) (*rev'd*, 507 U.S. 163)).

Here, as in both *Jones* and *Leatherman*, petitioners and amici would require respondents to amend their pleadings to demonstrate why the affirmative defense of implied immunity does not apply.[7] In an attempt to demonstrate the

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pleading standard in § 1983 suits against municipalities concluding that "'that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'").

[7] The fact that implied immunity constitutes an affirmative defense cannot be seriously challenged. As the Second Circuit recently recognized in a similar antitrust case, "most immunities are affirmative defenses." *See, e.g., In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 151 (2d Cir. 2003) (*citing Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (qualified immunity for a public official); *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 104 (1964)

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need for a heightened pleading standard, petitioners and amici criticize respondents' complaints for containing only "vague and conclusory allegations," United States Amicus Br. at 24, attempt to distinguish the importance of the allegations based on their placement within the Complaint, *id.* at 26, and assume that the complaint seeks to impose liability based on allegations of potentially immune conduct. *Id.* at 25. But nothing in Rule 8 requires a complaint to be "ordered" in any specific fashion nor does the rule prohibit background information to put the allegations of illegal conduct in context.

Forcing respondents to re-plead to avoid allegations of conduct that may be implicitly immune imposes a heightened pleading standard requiring respondents to plead facts demonstrating that the affirmative defense of immunity does not apply to their antitrust claims. Such a requirement conflicts with the undeviating line of cases culminating in the *Jones* decision announced just last month. What petitioners and amici ask for "is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman,* 507 U.S. at 168. This Court should leave the matter to the lower courts to "rely on summary judgment

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(White, J., concurring) (absolute immunity); *Troxler v. Owens-Illinois, Inc.*, 717 F.2d 530, 532-33 (11th Cir. 1983) (statutory immunity); 2 MOORE'S FEDERAL PRACTICE § 8.07[5] (3d ed. 1999) ("In addition to the 19 affirmative defenses set forth [in Fed.R.Civ.P.] 8(c)[, that Rule] requires 'any other matter constituting an avoidance or an affirmative defense' to be pleaded. Affirmative defenses and avoidances other than those specifically referenced [in Rule 8(c)] have been found to include common law immunity, statutory immunity, [and] exemption under a statute or regulation. . . . ") (footnotes omitted).

and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.* at 169.

V. THIS COURT SHOULD NOT ESTABLISH A CATEGORICAL RULE BARRING USE OF IMMUNIZED CONDUCT AS EVIDENCE AT TRIAL OF NON-IMMUNIZED CONDUCT.

Petitioners and amici ask this Court to establish a categorical rule prohibiting the introduction of evidence of authorized conduct from which the jury could infer unauthorized behavior, not immunized under the antitrust laws. Pet. Br. at 48-49; United States Amicus Br. at 23-29. For example, the Second Circuit found stabilization activities and collaborative underwriting to be immunized from the antitrust laws because they were specifically permitted by regulation. *Billing*, 426 F.3d at 10-12. The petitioners and amici apparently would have this Court prohibit introduction of evidence related to meetings of the underwriting syndicate or of the road show meetings, even if that testimony would allow a jury to determine that those meetings provided an opportunity to collude on tie-ins or laddering or would facilitate the policing of the conspiracy. Pet. Br. at 48-49; United States Amicus Br. at 23-29.

Any categorical prohibition would be contrary to this Court's longstanding jurisprudence that conduct that might otherwise be subject to immunity can still constitute part of the evidence admitted, within the discretion of the trial court, on a motion or at trial. *See United Mine Workers,* 381 U.S. at 670 (stating that although "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." Evidence of such immune conduct could be admitted

within the discretion of the trial court, "if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." *Id.* at 670 n.3 (quotation and citations omitted); *see also Nicks v. State of Missouri*, 67 F.3d 699, 702 (8th Cir. 1995) (admitting evidence arguably immune under "qualified immunity doctrine" because a district court has broad discretion to admit or exclude evidence) (citations omitted); *Cipollone v. Liggett Group, Inc.*, 668 F. Supp. 408, 410-11 (D.N.J. 1987) (observing that the Supreme Court has made plain that even if such evidence of prior or subsequent transactions are barred from forming the basis for a suit, it may nevertheless be introduced if it reasonably tends to show the purpose and character of the particular transactions under scrutiny) (citations omitted); *Sonitrol v. American Tel. and Tel.*, 629 F. Supp. 1089, 1101 (D.D.C. 1986) (holding that although "these rates cannot themselves be used as bases of antitrust liability given the application of the state action immunity doctrine to defendants' anticompetitive conduct," it would of course still be "within the province of the [Court] to admit this evidence, if [it] deemed it probative and not unduly prejudicial, under the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose of the particular transactions under scrutiny") (citations omitted).

There is no reason in this case to depart from long-standing and well-established precedent to create a categorical rule for implied immunity cases. Allegations that petitioners met and discussed appropriate topics about the IPOs at issue should not be precluded if respondents properly allege that, at these meetings, petitioners

also agreed to illegal tying and laddering. The facts that these meetings may have facilitated illegal agreements, made policing those illegal agreements possible and demonstrated petitioners' motive or opportunity to effectuate those illegal agreements are probative evidence relating to petitioners' scheme that sets the background, opportunity and incentive to put respondents' other allegations in a proper context. The district court is well armed by the Rules of Evidence, adequate decisional law and the discretion it provides, to manage the evidentiary issues that this case may present. Nothing more is required and, adopting any preconceived standard for implied immunity cases would be akin to adopting the heightened pleading standard urged by petitioners and amici. As with the pleading rules, any suggestion that the Court should alter the Rules of Evidence or their application on a case by case basis contradicts established law. *E.g., United Mine Workers,* 381 U.S. at 670 n.3.

CONCLUSION

For all the above reasons, the American Antitrust Institute, as amicus curiae, respectfully requests this Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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